IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1282 OF 2004.

Shri Chandulal Premraj Gadiya ...Appellant

Versus

Smt Nandubai Mohanlal Gadiya & Ors. ...Respondent

Shri G.S.Godbole for the Appellant.

CORAM : ABHAY S.OKA, J.
DATED : 19th November, 2007.

P.C.:

1. Heard learned Advocate appearing for the Appellant-Plaintiff. The Appellant-Plaintiff filed a suit for perpetual injunction against the Respondents herein. The case of the Appellant-Plaintiff is that he is the owner of the suit land bearing Gat No.104 and is in possession of the same. The Respondent Nos.1 and 2 (Defendant Nos.1 and 2) are the legal representatives of Mohanlal who was the real brother of the Appellant. According to the case of the Appellant he purchased the suit property by a registered sale deed and only to avoid technical difficulties he purchased the suit property jointly in his name alongwith his brother Mohanlal. The case of the Appellant was that the said Mohanlal had no right, title and interest in respect of the suit property.

2. The third Respondent (3rd Defendant) is claiming on the basis of Agreement for Sale dated 04th February, 1984 executed by the first and second Respondents. Initially a suit filed by the third Respondent for specific performance against the first and second Respondents was decreed. In Appeal the said decree was set aside.

3. The Trial Court dismissed the suit filed by the Appellant by holding that the Appellant had jointly purchased the suit property alongwith his brother Mohanlal. The Trial Court found that the Appellant-Plaintiff was in possession of a specific part of the property. The Appeal preferred by the Appellant-Plaintiff has been dismissed on the ground that during the pendency of the Appeal the Appellant has alienated northern side one half portion of the suit property by a Sale Deed dated 11th February, 2000 and the first and second Defendants have executed a Sale Deed in favour of the third Defendant.

4. The learned Advocate appearing for the Appellant submitted that even assuming that the first and second Defendants had one half share in the suit property, there was no partition between the Appellant and the first and second Respondents. He submitted that even

the Appellate Court found that only northern side one half portion of the suit property has been alienated by the Plaintiff. He submitted that in absence of partition, the Plaintiff-Appellant is not divested of his right, title and interest in respect of remaining portion of the suit property. He submitted that the finding recorded by the Court in the suit for specific performance filed by the third Defendant (3rd Respondent) is not binding on the Plaintiff-Appellant.

5. I have considered the submissions. Apart from the finding recorded in Appeal arising out of suit for specific performance filed by the third Respondent, the Appellate Court has considered the evidence on record and has come to the conclusion that Appellant and his deceased brother Mohanlal were the joint owners of the property. The Appellate Court has referred to the consolidation scheme in which name of the first and second Defendants were recorded as joint owners in possession alongwith the Appellant. Thus, there is a finding of fact that the Appellant was having one half share in the suit property and the first and second Respondents were entitled to remaining one half share in the suit property.

6. What has been found by the Appellate Court is

that during the pendency of the Appeal Appellant executed a registered conveyance in respect of northern side one half portion of the suit property. The execution of the Sale Deed is admitted. The Appellate Court observed that the Appellant has not amended the plaint. The Appellate court also noted that the first and second Defendants also executed a Sale Deed in favour of the third Defendant.

7. As the execution of the Sale Deed by the Appellant-Plaintiff during the pendency of the Appeal was admitted, it was for the Appellant-Plaintiff to amend the plaint to make out a case that notwithstanding the execution of the Sale Deed in respect of one half portion of the suit property, he was entitled to claim injunction in respect of remaining property.

8. Considering the aforesaid circumstances, the courts below especially the Appellate Court was justified in declining discretionary and equitable relief of perpetual injunction in favour of the Appellant.

9. No substantial question of law arises. Second Appeal is accordingly dismissed.

JUDGE